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Potential of Tabarru' Fund's Coverage for Pandemics within Framework of Takaful: Does it Necessitate Ijtihad?

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Abstract: Global economic and social development has been severely inhibited by the COVID-19 outbreak. The long-term closure of economic sectors has resulted in numerous losses and presents a great challenge for many industries in recovering their losses. Pandemics are not generally covered by insurance and takaful companies because the outbreak of a disease on a global level is a rare event that requires a substantial amount of capital to cover it. Still, many insurances and takaful operators voluntarily agreed to waive this condition and circumvent relevant rules to provide coverage for COVID-19 treatment during a specific period of time. The takaful industry has been challenged in providing hospitalization benefits to COVID-19 patients where a pandemic clause is not included in the takaful contract. This conceptual paper focuses on when the contracting parties require ijtihad from shariah scholars to determine the need for tabarru' funds when a pandemic has not been stated in the contract. By using qualitative approach, this study finds that takaful contracts require amendment of their clauses, or that other fundings need to be established for matters not specified in contracts, such as epidemics and pandemics.
Keywords: COVID-19, Takaful Industry, Ijtihad, Pandemic Coverage, Islamic Finance
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INTRODUCTION

The virus causing COVID-19 was detected in the city of Wuhan, China, in mid-December 2019 (Deng & Peng, 2020); the outbreak was declared a pandemic by the World Health Organisation (WHO) later on 11 March, 2020. Some of its symptoms include a sore throat, headache and myalgia, which have been identified by previous researchers as potential COVID-19 infection risk indicators (Ahmed & Ali, 2019; Anusha, 2018). The virus affects the human respiratory system and causes respiratory failure as well as multi-organ dysfunction (Weible et al., 2020). The pandemic has deeply shaken economies across the globe and has had a serious impact on countries' social and political fabric. In Malaysia, COVID-19 was detected on 23 January 2020 (Berita Harian, 2020a) and, according to its Ministry of Health (MOH) Ministry of Health (MOH) (2021), the virus has so far struck 2,232,960 Malaysians, killing a total of 25,935. The virus is highly contagious as it transmits easily from person to person and presents a relatively high risk of death. To prevent the pandemic's spread, the Malaysian government enforced the Movement Control Order (MCO) on 18 March 2020 to comprehensively reduce the movement of people in order to break its chain of transmission (The Star, 2020). In addition, the government approved the recruitment of 8,000 health workers in 2020 and hired more than 3,500 medical officers, paramedics, laboratory technicians and nurses to strengthen the public health system and enable it to cope with increasing cases of the contagion. The situation in government hospitals has become very critical following the phenomenal rise in viral infections, necessitating the cooperation of private hospitals to supplement government efforts and ease the burden on the Malaysian health system (Astro Awani, 2020). The government has, therefore, allocated RM100 million for private hospitals to encourage them to treat COVID-19 and non-COVID-19 patients and thus help reduce the strain on the public health system (Salim, 2021). However, treatment at private hospitals is still problematic for COVID-19 patients as these healthcare facilities' charges are prohibitively higher than government hospitals. Many patients cannot afford to pay high medicals bills and even those who have *takaful*/insurance coverage are not better off: they are unable to claim for the pandemic because it is not included among the risks covered by their insurance policies.

The main contribution of this paper is to discuss the provision of coverage for COVID-19 treatment to cope with the phenomenal rise in the number of infections. *Ijtihad* was carried out on the payment of treatment/hospitalization charges to *takaful* medical plan holders from *tabarru'* funds since the consent of *takaful* participants is required to use such funds for purposes other than those clearly stated in the contract. The following section adds to the discussion of *takaful* in pandemic situations that necessitate the intervention of particular parties to assist those affected. It also highlights a number of questions about the sustainability of *takaful* funds' use for purposes not specified in the contract.

1. LITERATURE REVIEW

1.1. The Concept of Takaful and the *Tabarru'* Fund

Conventional insurance is a contract under which an insurance operator offers coverage for various risks and events. It commits to pay individuals who buy insurance policies, or to its beneficiary, a certain amount of compensation, or other types of damages, in the event of an insured risk. This protection is offered after the individual taking out the policy from the insurance company makes certain payments. After receiving the payment, the insurance company will be responsible for bearing the types of risks insured in the form of compensation payments based on certain calculation methods (Dorfman & Cather, 2013; Lawrence et al., 2010).

There are two forms of interest (*riba)* in conventional insurance. Firstly, money is exchanged for money. Premiums are paid in cash and, likewise, the policyholder obtains the claim in cash. The element of interest (*riba)* is created as the exchange is not done on the spot, and the amount received by the policyholder is usually more than the actual amount paid. Secondly, premiums paid by policyholders are invested in shariah-non-compliant securities. In addition, there is the issue of uncertainty (*gharar*) in conventional insurance, as a lack of access to information on the subject makes it suspect from an Islamic point of view (Shofawati, 2020).

Those insured never know if they will receive the contract's subject matter (Abdullah, 2013). The indemnity depends on the occurrence of a specified loss. In other words, they will receive indemnification if the damage occurs; otherwise, they will not. This type of uncertainty makes such a contract similar to gambling (*maysir*) which depends on chance and may only offer profit to one party and loss to another (Ahmad, 2003). In contrast, *takaful* is an Islamic insurance system developed in accordance with the requirements of shariah. It has been introduced to protect from risks that may cause harm to participants or their properties. Malaysia's *Islamic Financial Services Act 2013* (*IFSA 2013*) defines *takaful* as:

> *An arrangement based on mutual assistance under which takaful participants agree to contribute to a common fund providing for mutual financial benefits payable to the takaful participants or their beneficiaries on the occurrence of pre-agreed events.*

In order to provide protection from risks that may cause harm, the idea of Islamic insurance has been built upon mutual cooperation and *tabarru'*, in which a policyholder's risk is shared by all participants. The term "risk" in *takaful* refers to the possibility of the occurrence of an event and the severity of its effects. It will, therefore, always involve uncertainty arising from the possibility of the occurrence of an event. Murray (1914), in *Oxford English Dictionary*, defines "risk" as the chance or hazard of commercial loss, particularly in the case of insured property or goods. Risk as a verb means "…to hazard, exposure to misfortune, danger or loss." According to Haynes (1895):

> *The word risk has acquired no technical meaning in economics, but signifies here as elsewhere chance of damage or loss. The fortuitous element is the distinguishing characteristic of a risk. If there is any uncertainty whether or not the performance of a given act will produce a harmful result, the performance of that act is the assumption of a risk.*

The term "uncertainty" is often used in the same vein as "risk", which has generally been defined as the possibility of loss. For example, a smoker may be at risk of lung cancer, although not all smokers contract lung cancer: there is thus uncertainty when the possibility of the occurrence of a future event is unknown (Philippe, 2001; Samson, 2009). In the case of an insurer, actuaries predict the amount of loss and charge a premium based on these expectations. The accuracy of the predicted loss is the desired outcome for the insurer; the risk is the likelihood that the loss would differ significantly from expectations (Vaughan, 2003). There are various types of business risks that are relevant to the *takaful* industry—one of them is underwriting. This risk occurs because an adverse selection of applicants with higher-than-average chances of loss may succeed in obtaining *takaful* coverage at standard rates. This would disturb the cash flow pattern and, hence, affect the stability of company profits (Rejda, 2006). Therefore, *tabarru'* funds must be sufficient to cover expected claims.

The *takaful* contract is an agreement between a group of people who agree to protect and assist one another if one suffers a misfortune. Each group member is obligated to pay a specified amount as a participation payment based on the shariah concept of "commitment to donating" (*iltizam bi al tabarru'*). These payments are donated to a participants' risk fund, which is used to assist individuals in the group who have an accident/misfortune based on mutually agreed terms and conditions. Contributions/payments paid by participants based on *tabarru'* transfer ownership of their contribution to the *tabarru'* fund (Ali et al., 2014). A *takaful* operator is a representative who manages the *tabarru'* fund on behalf of the *takaful* participants; therefore, *takaful* operations require able management and strategy for their fund. Bank Negara Malaysia (BNM), the regulatory authority that regulates the Islamic financial system in Malaysia (Hussain et al., 2017), requires that a takaful operator manage the two funds separately, as stated in *IFSA 2013*:

> *90. licensed takaful operator shall establish and maintain one or more takaful funds for any class or description of its takaful business as may be specified by the Bank*

91. A licensed takaful operator shall keep any takaful fund established and maintained under section 90 separate from its shareholders' fund

The provisions of Section 92 require the *takaful* operator to manage any *takaful* funds received on behalf of a participant in order to protect that participant's interests as the representative of participants for managing the fund. However, a *takaful* operator may withdraw funds to pay a pledged liability.

92. (1) A takaful fund established under section 90 shall be maintained and managed by a licensed takaful operator on behalf of and in the best interests of the takaful participants and the licensed takaful operator shall—

(a) pay into a takaful fund all receipts in respect of takaful certificates to which the takaful fund relates and which are issued by it or under which the takaful fund has undertaken liability, including all income of that takaful fund;

(b) maintain at all times assets in a takaful fund of a value equivalent to or higher than the liabilities of that takaful fund;

(c) apply the assets of a takaful fund only to meet the liabilities and expenses properly incurred by that takaful fund; and

If the *tabarru'* fund is insufficient to meet its financial obligations, the *takaful* operator will bear these responsibilities. BNM (2010) has stated that a benevolent loan (*al-qard)* should be given to the participants' risk fund from the shareholders' assets to address a deficit in funds (Hussain et al., 2013). It is also stated in *IFSA 2013*:

95. Where the value of the assets of the takaful fund is less than the value specified under paragraph 92(1)(b), the licensed takaful operator shall provide *al-qard* or other forms of financial support to the takaful fund from the shareholders' fund for an amount and on such terms and conditions as may be specified by the Bank.

The contractual relations in *takaful* can be divided into three facets:

a) Contract between the company and the participant. The participant in the *takaful* contract is considered a *muwakkil* (principal), and the *takaful* operator is the representative (agent) who will manage the participant's funds. On behalf of the participants, the *takaful* operator (agent) is responsible for managing the fund, including contract arrangements, administrative matters, underwriting activities, technical problems, and managing the fund's investment portfolio. The contract between the participants and the *takaful* operator is long-term, which explains the obligations of the parties involved. The participants must pay contributions of a certain amount regularly to the *takaful* operator as agreed in the contract. If the participants fail to fulfill this commitment, then their participation in the *takaful* scheme will be void, and they will not be eligible for *takaful* coverage (Noor & Zakaria, 2010).

b) Contract between the participant and the fund. According to current practice, the contribution payment is based on *tabarru'*. Participants should not only think of their own protection but also intend to help other participants. Without the concept of *tabarru'*, this *takaful* contract would be similar to an insurance contract. *Takaful* contribution payments are divided into two: the participants' investment fund and the participants' risk fund (Mohd Fadzli, 1996). After the participants' contributions are transferred to the *takaful* fund (*tabarru'* fund), the payment of contributions to the participant's risk fund (*tabarru'* fund) belongs to the fund itself rather than the participant. In case of misfortune, the participant obtains *takaful* benefits from the contribution based on the contract. Therefore, the contribution payment handled by the *takaful* operator is transferred to the participant.

c) Contract between the company and the fund. Since the contributions belong to the *tabarru'* fund, the *takaful* operator manages it in his or her capacity as a *wakil* (if the contract is based on *wakalah*) or as a *mudarib* (if the contract is based on *mudarabah*), in line with shariah principles. All returns on the investment will be pooled back to the fund. It is the responsibility of the *takaful* operator to generate profits for the company and strive to strengthen the *tabarru'* fund so that it remains profitable. As the participant assigns full responsibility for managing the fund to the *takaful* operator, any negligence regarding the fund will rest with the *takaful* operator. The *takaful* operator agrees to pay the participant (who has suffered a defined loss upon the occurrence of a specified misfortune) compensation or indemnity from the *tabarru'* fund. Other than that, *takaful* operational costs such as re-*takaful* arrangements and establishing technical reserves are covered by the fund (Tolefat, 2008).

The *takaful* contract's provisions may provide insight into each party's responsibilities and rights. Participants are entitled to know how *tabarru'* funds are used, as they are the ones who contribute the payments and the *takaful* operator is the representative who manages the funds. Currently, benefits like covering h costs for COVID-19 patients are not included in *takaful* contracts due to the lack of a pandemic clause in the pact. Most of the exclusion clauses in insurance/*takaful* do not cover infectious diseases such as pandemics, which saves the *takaful* operator from receiving claims that could result in the *tabarru'* fund running into a deficit. Section 92 of *IFSA 2013* states that takaful operators should assure the maintenance of takaful funds to protect the interests of participants in the *takaful* certificate/plan. The *takaful* operator can use the *tabarru*' fund only to pay for liabilities under the contractual agreement.

1.2. The Concept of Ijtihad

The Quran lays down instructions and guidance about how a believer should lead his life, and Islamic scholars are required to interpret the divine message to respond to the varying needs and priorities of every age. Should a situation arise for which scholars do not find any clear-cut instruction in the Quran and Sunnah, jurists and scholars invoke *ijtihad* to adapt to changing requirements of life in a Muslim society. *"Ijtihad"* is striving or exertion for something. In Islamic jurisprudence, the word stands for a jurist or mujtahid's efforts to derive principles and rules from the sacred text of the Quran and Sunnah with the help of reason. *"Ijtihad"* is also defined as a jurist's reasoning toward a logical conclusion by using the legal precepts of Islam (Rahman, 1999). Only the jurist may determine whether or not he has exerted his energies in deriving a legal principle (Codd, 1998). Thus, *ijtihad* is a creative and comprehensive intellectual effort to derive legal decisions on specific matters from shariah legal sources in light of society's current realities (Kamali, 1998). It is a collective obligation of Muslims and scholars to exert themselves thus in order to find solutions to new problems and provide necessary guidance in matters of law and religion. It also demonstrates the role of intellect in the process of determining Islamic law on issues or problems that are not clearly stated in the Quran and Sunnah. In addition to the Quran and Sunnah, *ijtihad* is the most important source of Islamic law. The major distinction between it and the revealed sources of the shariah is that *ijtihad* is a never-ending process of law-making while legislation through divine revelation and Prophetic Sunnah ceased with the demise of the Prophet (PBUH) (Albelahi et al., 2018). Jurists employ *ijtihad* to seek answers in the light of the Quran and Sunnah for fresh problems that had no precedent in the life of the Prophet or His companions and arise from the newer and more challenging conditions of modern society. Thus, *ijtihad* activity is never supposed to stop: it is a required religious duty binding on those who are qualified to resolve new questions (Javed & Javed, 2011). The scholar who conducts *ijtihad* is called a "*mujtahid*". Only a well-qualified person who fulfills all preconditions for a *mujtahid* can attempt a valid *ijtihad*. The preconditions for being a *mujtahid* have been thoroughly discussed by many scholars, past and present.

Ijtihad by a group of qualified experts is called collective *ijtihad* (*ijtihad jama'i*). Conceptually, such *ijtihad* is defined as the earnest efforts a group of *fuqaha* makes through a process of discussion and exchange of opinion on problems that occur during the course of finding answers to a new question under Islamic law (Hasan, 2003a). In order to achieve the best possible results from collective *ijtihad*, experts from related fields must collaborate to help resolve the issues. Collective rulings are currently desirable, especially on complex issues such as Islamic finance practice adhering to shariah (Rafikov & Akhmetova, 2020).

In Malaysia, the practice of collective *ijtihad* has been implemented in the field of Islamic finance. It has been institutionalised in the form of a Shariah Committee (SC), which is an advisory body established by BNM for Islamic financial institutions (IFIs) as stated in Section 30 of *IFSA 2013*. It has a role in advising and making decisions for IFIs to ensure that all activities comply with Shariah. The *Shariah Governance Policy Document 2019* released by BNM requires that at least five members be appointed to the SC to serve the IFIs who must meet prescribed qualifications (BNM, 2019). At a national level, the Shariah Advisory Council for Bank Negara Malaysia (SAC BNM) was established under the *Central Bank of Malaysia Act 2009* (*CBA, 2009*) (Act 701) as an advisor and point of reference for all matters relating to Islamic finance, as well as other matters that require the application of Islamic law. IFIs may request a ruling and advice from SAC BNM to ensure that a transaction contains no elements that are not Sharia-compliant, as stated in Section 55, *CBA 2009* (Hasan, 2010).

The relevance of *ijtihad* has been highlighted by the growth of the Islamic finance and banking industry, which must be inventive and competitive in order to survive and provide superior services to customers. In Islamic finance, *ijtihad* is required to create new instruments. In the following discussion, *ijtihad* will be applied to the practice of *takaful* to determine shariah rulings on the use of *tabarru'* funds to provide pandemic coverage.

2. AN OVERVIEW OF PANDEMIC COVERAGE IN INSURANCE AND *TAKAFUL*

Takaful plays a vital role in modern Muslim societies because it helps individuals, businesses and countries to manage risk. In early 2020, insurance companies and *takaful* operators agreed to deal with the scourge of COVID-19 by providing protection to policyholders affected by it (Life Insurance Association of Malaysia (LIAM), 2020). At that time, there were medical/health products for those affected by COVID-19. Table 1 shows the coverage provided by *takaful* operators to medical and health *takaful* policyholders.

On 11 March 2020, the World Health Organization (WHO) declared COVID-19 a pandemic. At a news briefing, WHO Director-General Dr. Tedros Adhanom Ghebreyesus noted that the number of COVID-19 cases outside China had increased thirteen-fold and that the number of countries affected by the virus had tripled. He also feared the figure would continue rising (WHO, 2020). Johns Hopkins University reported that 216,725,577 persons have been infected and 4,505,738 have died due to the COVID-19 pandemic (Johns Hopkins, 2021).

Table 1: Coverage for those affected by COVID-19

No	Takaful Operators	Coverage	
		Hospitalization Benefits	**Death Benefits**
1.	AIA Public Takaful Berhad	/	/
2.	AmMetLife Takaful Berhad		/
3.	Etiqa Family Takaful Berhad	/	
4.	FWD Takaful Berhad	/	/
5.	Great Eastern Takaful Berhad	/	/
6.	Hong Leong MSIG Takaful Berhad	/	/
7.	Prudential BSN Takaful Berhad	/	
8.	Sunlife Malaysia Takaful Berhad	/	
9.	Syarikat Takaful Malaysia Keluarga Berhad	/	
10.	Takaful Ikhlas Family Berhad	/	
11.	Zurich Takaful Malaysia Berhad		/

Source: Authors' analysis based on MTA data

A global pandemic is a novel illness that spreads from person to person across the world. It infects and kills more people than are affected by a normal epidemic and may have broad social and economic impacts (Potter, 2001). There have been many different types of global pandemics over the last century (Kong, 2021). For example, in 1918–1919 the "Spanish" influenza epidemic killed about 50 million people worldwide (Taubenberger & Morens, 2006), Asian Flu in 1957–1958 caused around one to two million deaths (Henderson et al., 2009) and Hong Kong Flu in 1968 was responsible for 500,000 to 2 million deaths. Influenza 'A' killed about 284,000 people in 2009 and the Ebola virus caused the death of 11,300 people over the world in 2014–2016 (Coltart et al., 2017). The situation is aggravated when the virus mutates with human-to-human transmission. In fact, in this globalised age, the virus spreads more easily and speedily (Mas-Coma et al., 2020; Shrestha et al., 2020). Resembling the H5N1 avian flu virus, COVID-19 is also highly contagious in humans and no one knows when or where the virus may mutate.

As a rule, pandemic-related risks are not covered by any insurance and *takaful* plans across the world. The exclusion is due to the difficulty of pricing coverage for once-in-a-lifetime events like a pandemic, which have an incalculable impact and cost (Berita Harian, 2020b). For example, a pandemic influenza outbreak led to Rs155 billion worth of additional death claims. The unexpected loss of lies will affect life insurance companies, especially those without strong financial resources (Weisbart, 2006). Pandemics have been assumed to be rare events, which explains why most insurance policies do not cover viral outbreaks. Insurance premiums will automatically be higher if a pandemic is covered because premiums are proportional to risk exposure. However, most insurance companies and *takaful* operators have provided protective assistance to policyholders and participants affected by COVID-19 as a goodwill gesture. Malaysia's COVID-19 assistance program/campaign offered coverage such as cash relief, hospitalisation claims and death benefits. This program/campaign has limited funds and protection period.

The insurance/*takaful* industry is currently working with the Malaysian Ministry of Health and BNM to examine how insurance and *takaful* operators can help patients with diseases that necessitate treatment in private hospitals (MTA, 2021). Cooperation from private hospitals in treating COVID-19 patients is needed to prevent public health services from becoming overburdened as the number of COVID-19 cases increases daily. Government hospitals can no longer treat COVID-19 patients due to overcrowding and the poor state of public healthcare facilities. Three Malaysian hospitals have recently been transformed into full COVID-19 facilities: Sungai Buloh Hospital, Ampang Hospital and Selayang Hospital (The Star, 2021b). Several economic recovery plans have been introduced by the Malaysian government as a measure to help the economy recover and minimise the economic impacts of the pandemic such as Household Living Aid. In addition, subscriptions to the micro-*takaful* protection scheme called MySalam have been provided: it has received claims of RM1,263,100 to cover eligible COVID-19 patients (as of 5 July 2020) (Abdullah, 2021). In order to support the Ministry of Health's efforts to conduct more COVID-19 tests for Malaysians, the insurance and *takaful* industry has set up a special aid fund of RM8 million, this will provide cash refunds for COVID-19 test costs for policyholders (LIAM, 2021). The industry has since contributed another RM2 million to the existing fund (MTA, 2021). Cooperation between the parties involved in combating this global epidemic can help the government ensure the sustainability of the Malaysian health system.

Although the industry has cooperated with the government over these issues, there are still questions about whether *takaful* operators should provide full protection against pandemics, especially for medical and health policyholders. At present, public hospitals are unable to treat victims of COVID-19. However, protecting life is very important, so private hospitals have joined together to provide appropriate treatment for these patients. One issue for COVID-19 patients at private hospitals is prohibitively high medical bills. This raises the issue of whether *takaful* operators should protect policyholders who have been affected by COVID-19.

3. DISCUSSION

3.1. Non-Coverage of Pandemic in line with *Tabarru'* Contract.

Generally speaking, the pandemic is a risk that is not covered by any insurance and *takaful* plans. If the application form for an insurance claim clearly excludes pandemic from the risks being covered, then no problem arises; however, if the *takaful* operator's contract does not explicitly exclude pandemic, then the policyholder may still be required to pay for coverage (Berita Harian, 2020b). It should be noted that the practice of *takaful* and insurance differ from each other in more than one way.

Takaful based on a *tabarru'* contract which receives contributions from participants to a *tabarru'* fund, protects participants in the event of a disaster. *Tabarru'* funds are also called "participant risk funds" (PRFs). The contribution payment by participants to the *tabarru'* fund belongs to each participant. The *takaful* operator, as a representative, will manage the funds in accordance with what has been agreed upon in the contract. This differs from conventional insurance, where premium payments by policyholders belong to the insurance company and the risk to be covered by the company will be determined by shareholders (Ali & Odierno, 2008). This raises the question of whether it is permissible for *takaful* operators to use a *tabarru'* fund to pay claims to participants for COVID-19. The agreement among the participants in the *tabarru'* fund binds them to contribute to *tabarru'* and help fellow participants in need. There is debate over the ownership of the *tabarru'* fund, but it is, in fact, owned collectively by *takaful* participants. Therefore, the use of *tabarru'* funds for purposes not included in the contract must require the consent of the *takaful* participants (Muhammad, 2021).

However, suppose specific provisions in a takaful contract exclude certain events/risks—such as a pandemic outbreak—from coverage. In that case, the *takaful* operator will be unable to use *tabarru'* funds to cover policyholders affected by COVID-19. This is in line with the legal maxim, "Muslims are bound to fulfill all conditions (in a contract) except a condition which allows what is prohibited or prohibits what is lawful" (*al-muslimuna 'ala syurutihim illa syartan harrama halalan aw ahalla haraman*) (Al-Zarqa, 1989). Muslims must thus fulfill the terms and conditions they agree upon and accept the state's responsibility to enforce the terms of a contract. A valid contract takes place if two parties agree upon specific terms based on offer (*ijab)* and acceptance (*qabul*) in keeping with the spirit of the legal maxim, "The basic tenet of a contract is the consent of the parties to the terms and conditions that determine their rights and obligations under that contract" (*al-Ashlu fi al-'Aqdi ridha al-Muta'aqidain wa natijatuhu hiya iltizamahu bi al-ta'aqudi*).

Business transactions need to be carried out with the consent of the contracting parties to make the transaction legally and morally valid. An agreement or transaction is not valid if it involves only one party. Those who consent to a certain agreement are bound by that agreement. If the contract requires any changes, all parties involved should be notified beforehand, as no amendment can be made without the consent of those parties. Thus, the covenant can have an effect on the things agreed upon.

The rights and responsibilities of each party constitute the basis of their relationship. Thus, the alliance of *takaful* operators is obliged to provide protection, according to the agreement made between participants and the *takaful* operator, to those afflicted by calamities as stated in the contract. Thus, the parties have a bond based on the agreed contract (Bakar, 2009). Disasters or risks agreed to be covered under the contract are calculated by the actuary to determine the price or contribution to be paid by the participant. The amount of the contribution is proportional to the risk for which the participant wishes to be covered. While pandemic coverage is a new risk that needs to be addressed, it has not been specified in contracts at the outset. Therefore, it is necessary to obtain the consent of the other participants to change the agreement in the contract. However, the use of *tabarru'* funds for a new event will be detrimental to the fund as the actuary makes calculations by the risks to be covered. This pandemic constitutes a massive risk because it may result in substantial reductions of funds due to unpredictable losses.

In addition, the use of *tabarru'* funds for purposes other than those agreed upon in the contract is contrary to civil law. The definition of *takaful*, according to *IFSA 2013*, is a mutual arrangement under which *takaful* participants agree to contribute to a fund that provides mutual financial benefits to be paid to *takaful* participants or its beneficiary upon the occurrence of pre-agreed events (Jamil & Jamal, 2016). The final statement on the definition of *takaful* in *IFSA 2013* clearly states that only "pre-agreed events" can be covered by *takaful*. In other words, the *takaful* operator can withdraw *tabarru'* funds to pay only for agreed liabilities. Liabilities that are not agreed upon cannot be claimed by participants and cannot be covered by *takaful* operators either. These operators cannot provide protection against a pandemic if it is not stated in the contract. The use of *tabarru'* funds is also not permissible as this is the right of participants; the operator must obtain their consent to use *tabarru'* funds for matters not specified in the contract.

3.2. The Intervention of the Government Based on *Qawa'id al-Fiqhiyyah* and *Maqasid Shari'*ah

The rate of infection and death continues to grow, prompting the government to launch several urgent steps to stem the spread of the pandemic and break the COVID-19 chain. Quarantine is one of the finest strategies for preventing more major harm when the government wants to stop the spread of an epidemic or contagious illness. This government's effort is to ensure the people's survival. The implementation of the Movement Control Order (MCO) by the government constitutes an action under the *syar'iyyah* policy. The government also has amended the act and established a compound rate for offenders who disregard the government's standard operating procedures (SOP) and MCO (Mizan et al., 2021).

Government should become involved in various industries to address problems brought on by the pandemic since it recognizes how important it is to protect the greater public interest (*maslahah*). The spread of the disease has an impact not only on people's health but also on their income. Therefore, the government has offered a number of support programs to lessen the burden on the populace, including RM 1,600 in aid to households with monthly incomes under RM 4,000, RM 10 billion allocations to aid Small and Medium Businesses (SMEs) with their financial load; One-off cash aid of RM 300 to single mothers, disabled persons and program volunteers; RM 25 million will be spent on food assistance, medical care, and shelter for homeless people, shelters, and health facilities; a three-month deferral of premium or contribution payments is provided to contributors by insurance companies and family takaful operators whose sources of income have been disrupted by the COVID-19 epidemic; and many more (Bernama, 2020).

Government intervention in urging Muslims to contribute *zakat*, *waqf* and *sadaqah* in order to mobilise efforts to support those afflicted by the COVID-19 outbreak is viewed as a reasonable step. *Zakat* collection can be distributed to qualifying *zakat* beneficiaries, while *waqf* property can be used for the community and the *sadaqah* fund can be distributed to all community groups and lastly takaful contributes to COVID-19 patients' treatment costs (Roslan at. el, 2021).

The government is highly concerned about preventing the spread of this pandemic, which could result in a massive death toll. In response to this problem, the government should assist private hospitals in lowering their operational costs, particularly expenses of managing COVID-19 such as testing, personal protective equipment, and treatment, which have become major hindrances to coronavirus patient care at private hospitals. Even though the pandemic is not covered by insurance or takaful, but in COVID-19 situation necessitated the involvement of government and private hospitals to provide treatment to many thousands of infected patients—shariah scholars need to formulate a new ijtihad to allow the use of *tabarru'* funds in pandemics.

The government may also establish a COVID-19 emergency fund or collaborate with the insurance or *takaful* industries to alleviate the financial responsibilities of private hospitals (Tan, 2021). The *takaful* principle of cooperation and mutual help can be applied within the framework of this *maqasid shari'ah*. It should also be kept in mind that this pandemic not only affects the health of individuals but also involves their quality of life —for example, some lose their source of income and jobs. Recognizing the importance of preserving the larger public interest (*maslahah)*, the government has intervened in this industry to resolve issues that have arisen from the pandemic.

Obedience to government instructions must be implemented as long as it aligns with Islamic Shariah. Actions taken to protect against the COVID-19 pandemic can assist the provision of healthcare: this is compatible with the shariah objective (*maqasid shari'ah)* of life protection. Its intervention to cope with the pandemic is in line with the legal maxim "(The legitimacy of) A leader's rule over people is linked to (his ensuring) the wellbeing of the people" (*at-tasarruful imam 'ala al-ra'iyyati manutun bil-maslahah*)(Al-Zarqa, 1989). Government is given empowerment and rights over their people, but they are equally obligated to ensure their peoples' welfare, well-being and peace.

3.3. Providing Pandemic Coverage Fulfils the Spirit of *Ta'awun*

The issue of coverage against the pandemic requires in-depth discussion and feedback from all parties concerned. As insurance and *takaful* have the common objective of providing financial assistance in the event of misfortune, *takaful* operators follow the insurance market where pandemics are not covered; however, since the spirit of *takaful* is ssdcooperation (*ta'awun)*, it should reflect this in the services offered.

The *takaful* operator should utilize the possibility of pandemic coverage, which can be made possible through the offer of an additional rider. It will lessen the difficulties faced by people, especially policyholders, in getting treatment coverage for the pandemic. The increasing burden on public hospitals can also be reduced if policyholders can have access to *takaful* coverage for pandemic. While it is not granted against pandemics under existing contracts, it can be considered as a gesture of goodwill. At present, most takaful operators do aid policyholders with regard to COVID-19 but their assistance is only for a certain period of time or until the funds allocated for a time-bound program or campaigns have been depleted.

4. CONCLUSIONS AND RECOMMENDATIONS

Shariah scholars are required to employ *ijtihad* after examining longer-term solutions to address the problem of providing benefits or protection against unforeseen events or incalculable risks. This paper proposes some recommendations to all the parties concerned for seeking pandemic protection under *takaful* contracts:

4.1 For Policymakers/ Government

The government should revise its policies to allow pandemics to be treated as a protectable risk under *takaful* contracts by practical means such as the contribution to be charged, maximum coverage and an additional rider. Data analysis on the current COVID-19 situation can help the government estimate the size of the contribution to be paid by participants. The Organisation for Economic Co-operation and Development (2021) has conducted studies on pandemic coverage in insurance with business losses and reports that a majority of policyholders have not purchased business interruption insurance to cover losses caused by COVID-19 business closures. There are insurance firms that provide additional coverage or make voluntary payments to businesses that have been impacted by COVID-19—as practiced in Switzerland, Germany, France and other countries.

The Washington State Office of the Insurance Commissioner (2020) has reviewed several insurance companies and found that two insurance firms provided pandemic coverage in their standard policies, while 15 others provided limited coverage by endorsements to existing plans. In light of the foregoing precedents, *takaful* operators are more entitled to provide protection against pandemics because *takaful* is based on the high Islamic value of *ta'awun* (mutual cooperation). Hence, *takaful* is better positioned to offer pandemic protection to save human lives, which is one of the basic tenets of shariah (*maqasid shari'ah*).

The current pandemic has impressed upon all parties (industry and government) the need to work together to combat this disease. Röhler (2020) suggests that insurers should take responsibility for coverage up to a contractually agreed limit. If that amount is exceeded, the government should cover the rest. Protection against pandemics under *takaful* contracts can at least help ease the government's burden from the high cost of treatment and lessen the increasing load of patients in public hospitals. It can also help patients/participants receive adequate treatment at both public and private hospitals when patients with *takaful* coverage seek treatment in private facilities and those without it go to public hospitals. It will also indirectly contain the virus' spread in an effective manner.

The pandemic has reached global proportions; hence, it cannot be addressed without emergency funds or support from governments. The situation is beyond the control of any individual. Although such pandemics rarely occur and are thus usually excluded from coverage under the laws governing the insurance industry, the *takaful* industry has the potential to provide protection against pandemics with costs set by actuaries and in-depth analysis. Last but not least, the government must act by allocating a sizable sum of money to the health sector in order to be ready to deal with a pandemic in the future, which is necessary for both national and international security.

4.2 For Takaful Operators

Although the pandemic is not generally covered by the *takaful* industry, it can help manage the crisis by conducting research and taking into consideration the experience of private hospitals that charge patients treatment costs as an additional amount to be paid later. The worsening situation at public and private hospitals concerning COVID-19 should be enough to convince shariah scholars to invoke *ijtihad* in order to ensure that *takaful* operators make use of huge *tabarru'* funds to provide protection against pandemics.

We propose that the *takaful* industry should offer an additional rider to participants who are interested in obtaining coverage for the pandemic. If participants are aware that they can seek protection against a pandemic, it is likely that they will apply for it. This will not burden the *tabarru'* fund because it will be used in accordance with the risks that have already been agreed upon, and the participant who applies for the additional rider will be charged an additional contribution according to the underwriting report and the risks covered. The participants' contributions, thus made, can be put into a ring-fenced *tabarru'* fund in which such contributions are segregated from the rest of the business or operations.

4.3 For Shariah Scholars/ Academia

The cost of treatment for COVID-19 is prohibitively high. It has been a heavy burden on patients, especially on policyholders' budgets, and has stretched their financial resources to the limit. To cope with this situation, the *takaful* industry is well positioned to help the government ease these burdens but it requires *ijtihad* to allow it use of *tabarru'* funds to offer protection against pandemics in accordance with the concept of *ta'awun*. The scale of the COVID-19 challenge warrants cooperation between the government and the *takaful* industry to cope with the pandemic and its aftereffects.

On the other hand, if the relevant clause is changed to allow the use of *tabarru'* funds for protection against the pandemic, it will put the *tabarru'* fund itself at risk as highly expensive treatment of COVID-19 will result in high bills and large claims. However, this risk can be avoided if the *takaful* industry follows the Islamic legal maxim "Harm may neither be inflicted nor reciprocated (*la darar wala dira*r)". This states that it is prohibited to inflict harm on others or let others harm (you) while engaging in commercial or business activities (Muhammad, 1958). If the number of claims rises beyond permissible limits, the *tabarru'* fund will be exposed to the potential deficit; the interests of other participants in the fund will be harmed if they require the fund to protect themselves in the event of a calamity, as promised in the contract.

In order to circumvent such harm, each risk should be evaluated throughout the underwriting process to determine if it should be approved or not. The risk of a pandemic is very high; therefore, no protection is offered against it as no substantial data has so far been collected on rare events like this. However, it may be asked whether protection can be offered against risks that are not certain to occur during the life of the participants. There is an element of uncertainty (*gharar*) in pandemics as these do not break out every year like seasonal viral diseases. Instead, they usually occur at intervals of 80 to 100 years, meaning that it is highly unlikely that someone will be exposed to a pandemic during his or her lifetime. Nevertheless, the risk of acquiring other diseases is certainly present in humans. Therefore, *takaful* coverage is suitable for diseases that are more often experienced in human life whereas it is uncertain whether a pandemic will occur in a person's lifetime.

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